IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 6TH SEPTEMBER 2007 / 15TH BHADRA 1929

RSA.No. 229 of 2007()

AS.31/2005 of SUB COURT, MANJERI
OS.370/1996 of MUNSIFF COURT, MANJERI

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: APPELLANT/APPELLANT/DEFENDANTS:

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1. PADINHAREPURAKKAL VELAYUDHAN,
AGED 54 YEARS, S/O THEYYAN VAIDYAR,
TIRUVALI AMSOM DESOM, NILAMBUR TALUK,
MALAPPURAM DISTRICT.

2. KUNNOOR PAYI, AGED 82 YEARS,
W/O PADINHAREPURAKKAL VHEYYAN VAIDYAR,
TIRUVALI AMSOM,DESOM, NILAMBUR TALUK.

BY ADV. SRI.K.R.VINOD

RESPONDENTS: RESPONDENT/PLAINTIFF

PADINHAREPURAKKAL NOTTAN VAIDYAR,
64 YEARS, S/O THEYYAN VAIDYAR,
TIRUVALI AMSOM DESOM, NILAMBUR TALUK.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 06/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.471/06 IN R.S.A.NO.229/07

6.9.07 DISMISSED SD/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 229 OF 2007

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Dated this the 6th day of September, 2007

JUDGMENT

Defendants in O.S.370/1996 on the file of Munsiff's Court, Manjeri are the appellants. Respondent is the plaintiff. Respondent instituted the suit seeking a decree for injunction contending that plaint schedule property originally belonged to Theyyan Vaidhyar, father of appellant and defendants and on the death of the father, his legal heirs including second respondent widow divided the property under Ext.A1 partition deed and as item No.2, plaint A schedule properties having an extent of 48 ½ cents was allotted to respondent and item Nos. 5 and 17 were allotted to appellants and property allotted to respondent is inclusive of a way on the eastern portion provided therein and though a way was provided for in Ext.A1 it was not being used. Appellants contending that there is a 15ft. width of way started constructing

a road by destroying medicinal plants, bamboo as well as saplings of teak and thereby caused a loss of Rs.10,000/-. It was also contended that appellants have no right to do so and respondent is entitled to a decree for mandatory injunction restoring the property to its original position and also for a permanent prohibitory injunction from making use of the plaint schedule property as a way. Appellants in their written statement contended that a pathway having a width of 15 ft. was provided under Ext.A1 partition deed and appellants are not entitled to obstruct the same and they did not cause any damage to the property and respondent is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of PW1, DW1, Exts.A1 to A2(a) and C1 to C4 granted a decree for mandatory injunction to restore plaint schedule property to its original position and also a permanent prohibitory injunction restraining appellants from trespassing into the plaint

schedule property and from committing any waste therein. The claim for damages sought for was disallowed. Appellants challenged the decree and judgment before Sub Court, Manjeri in A.S.31/2005. Learned Sub Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in second appeal.

3. Learned counsel appearing for appellants was heard.

4. The argument of learned counsel is that under Ext.A1 partition deed, a way on the eastern portion of 48 ½ cents allotted to respondent as item No.2 therein was provided and that way is having a width of 15ft and so on evidence courts below should not have granted a decree as sought for by the respondent. Learned counsel vehemently argued that as Ext.A1 does not provide that width of pathway is 3 ft. and report of Commissioner shows that the existing way is having a width of 15ft, courts below should not have granted a decree

in favour of the respondent. It was also argued by the learned counsel that eventhough Commissioner has found an electric post in the middle of the 15ft width of way, that does not mean that there was no way as claimed by appellants and in any case even if the electric post is in the middle of the way, half of that width would be 7 ½ ft and by restricting the width to 3 ft. appellants lost the way and respondent was granted a decree in his favour when he is not in possession of that property.

5. On hearing learned counsel and going through the judgments of the courts below , I do not find any substantial questions of law involved in the appeal.

6. Plaint schedule property originally belonged to the father of first appellant and respondent. Along with the other properties, plaint schedule property was divided under Ext.A1. Admittedly plaint schedule property was allotted to respondent as item No.2. It is having a total extent of 48 ½

cents. Ext.A1 itself shows that the said 48 ½ cents is inclusive of the way provided to appellants. But the width of the way was not provided in Ext.A1. Courts below on evidence found that the way provided under Ext.A1 is not a road but only a way having a width of 3ft as claimed by respondent. The argument of learned counsel appearing for appellants is that that finding is unsustainable as the report of the Commissioner shows that the existing way is having a width of 15 ft. Court below on evidence found that existing way was formed only just prior to the institution of suit. Courts below also found that case of appellants that the said way was in existence from the date of Ext.A1 partition deed cannot be true, in view of traces of trees cut for carving out the way as shown in the report of the Commissioner as well as due to the existence of electric post on the middle of that way. In the light of those findings of fact which is final, appellants are not entitled to claim that way was having a width

of more than three feet.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006